2008

# American Fork City v. William Shawn Asiata : Brief of Appellant

Utah Court of Appeals


Brett C. Anderson; Witt & Anderson; Attorneys for Defendant-Appellee.
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**IN THE UTAH COURT OF APPEALS**

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| **AMERICAN FORK CITY,**<br>Plaintiff / Appellant,<br>**vs.**<br>**WILLIAM SHAWN ASIATA,**<br>Defendant / Appellee. | **BRIEF OF THE APPELLANT**<br>Case No. 20080651-CA |

**APPEAL FROM AN ORDER OF DISMISSAL ON JULY 2, 2008, IN THE FOURTH JUDICIAL DISTRICT COURT, STATE OF UTAH, UTAH COUNTY, AMERICAN FORK DEPARTMENT, JUDGE HOWARD H. MAETANI**


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## STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Annotated § 78A-4-103. The Court of Appeals may hear "appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony." §78A-4-103(2)(e).

## STATEMENT OF THE ISSUES

**Issue 1**: Did the trial court abuse its discretion by ordering the Prosecution to produce the originals of five video recordings that the Prosecution did not have in its possession and did not intend to use at trial, when the Prosecutor had no greater access to the evidence than did Defendant?

**Standard of Review**: "Because trial courts have broad discretion in matters of discovery, this issue is reviewed for abuse of discretion." *Gardner v. Bd. of County Comm'rs*, 2008 UT 6, ¶ 51, 178 P.3d 893 (Utah 2008), quoting *Green v. Louder*, 2001 UT 62, ¶ 37, 29 P.3d 638.

**Issue 2**: Did the trial court err in dismissing the criminal case on the grounds that the Prosecution did not meet a deadline set for providing the original recordings, when the Prosecution had disclosed everything it possessed and intended to use at trial?

**Standard of Review**: In regards to involuntary dismissals, an appellate court should defer to the trial court's findings and inferences under a clearly erroneous standard. The Court of Appeals reviews a trial court's legal determinations for correctness, granting no deference to the trial court's conclusions of law. *Markham v. Bradley*, 2007 UT App 379, ¶¶ 12-13, 173 P.3d 865 (Utah Ct. App. 2007).

## DETERMINATIVE LAW

**Rule 16(a), Utah Rules of Criminal Procedure**

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or codefendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or codefendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

**Rule 25(a), Utah Rules of Criminal Procedure**

(a) In its discretion, for substantial cause and in furtherance of justice, the court may, either on its own initiative or upon application of either party, order an information or indictment dismissed.

**Rule 1002, Utah Rules of Evidence**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by Statute.

**Rule 1003, Utah Rules of Evidence**

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

**Rule 1004, Utah Rules of Evidence**

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
>
> (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> (2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
>
> (3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the content would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
>
> (4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

## STATEMENT OF THE CASE

### A. Nature of the Case

This case arises from an assault allegedly committed by William Shawn Asiata ("Asiata") on November 2, 2007, in American Fork City. The assault occurred during a high school football game. Towards the end of the game, a fight broke out on the field between the players. During the brawl, an American Fork high school student was kicked in the head twice. An investigation ensued and several concerned citizens came forward with video footage of the brawl that they had taken on their camcorders. These recordings were duplicated by the police, who subsequently returned back to the citizens whatever the citizen had turned in to the police.

Asiata was identified as the perpetrator of the crime and was cited for simple assault, a class "B" misdemeanor.

### B. Course of Proceedings

Asiata pled not guilty to the charge of assault. In response to the defense's request for copies of the video recordings, the Prosecution produced copies of all six (6) videos it had in its possession. Asiata subsequently requested the originals of the recordings. By that time, only one original remained in the possession of the police, which was the Bangerter video. Asiata moved to suppress the videos based on the fact that there was only one original. The Judge ordered the Prosecution to produce the originals, but the Prosecution was unable to do so because the originals had been returned to the owners, were lost, destroyed, or otherwise unobtainable.

### C. *Disposition Below*

Based on the fact that the Prosecution was unable to secure the five original recordings, the trial judge dismissed the case on July 2, 2008, prior to any trial. (R. 0124).

## RELEVANT FACTS

1. On November 2, 2007, American Fork High School hosted Hunter High School in a playoff football game. (R. 0095).
2. With 1:59 remaining on the game clock, a fight broke out on the field between the players of each school. (R. 0095).
3. During the brawl, a coach tried to protect an American Fork player by kneeling over him as a body shield. (R. 0095).
4. Defendant, William Asiata ("Asiata"), was a bystander who entered the field as the fight broke out. (R. 0094).

5. Asiata kicked the American Fork player, whom the coach was trying to protect, two times in the head. (R. 0094).

6. American Fork Police issued Asiata a citation and summons for Simple Assault, a Class "B" Misdemeanor, on November 11, 2007. (R. 0003).

7. At his Arraignment held November 21, 2007, Asiata pled "not guilty." (R. 0006).

8. During its investigation, the American Fork Police obtained six (6) home videos that citizens had filmed during the football game and brawl on their private camcorders. (R. 0134, p. 3, lines 18-20).

9. Asiata's attorney made verbal requests for copies of the videos, and subsequently filed a written discovery request on February 11, 2008. (R. 0129; R. 0027-0026).

10. One month later, Asiata supplemented his discovery requests by making a "Rule 17(a)(5) [*sic*] Motion for Release of Video and Audio Recordings." (R. 0031-0030).

11. Plaintiff, American Fork City ("Prosecution") produced copies of all six (6) videos, on DVD, to Asiata. (R. 0128, ¶ 7; R. 0038-0037).

12. Having duly made copies of the videos, the police department proceeded to return the originals back to the proper owners. (R. 0094; R. 0134, p. 4, lines 1-3).

13. The police did not record the names and addresses of the owners. (R. 0134, p. 4:1-3).

14. Upon the return of the camcorder and/or diskette to the owners, some of the owners erased the video or recorded over the footage of the brawl. (R. 0093).

15. Asiata subsequently demanded to have the originals of the videos, copies of which had been produced on DVD previously. (R. 0128).

16. Asiata filed a motion to suppress the videos because he had not been given the originals. (R. 0059-0057; R. 0134, p. 11).

17. By this point, the police department only had one original left in its possession, the video taken by citizen G. Paulo Bangerter. (R. 0134, p. 10, lines 16-19).

18. In addition to viewing copies of all of the videos, Asiata's attorney also viewed the original of the Bangerter video. (R. 0134, p. 10, lines 16-19).

19. The Prosecution informed Asiata's attorney that it would only seek to admit the Bangerter video at trial. (R. 0134, p. 4, lines 6-9).

20. The trial judge ordered the Prosecution to produce the originals to the remaining 5 videos. The Prosecution was unable to locate the originals or ascertain whether the originals still existed since it was not in possession of them. (R. 0123-0122).

21. The trial judge dismissed the case based on the fact that the Prosecution was unable to secure the originals. (R. 0125-0124).

## SUMMARY OF THE ARGUMENTS

The trial court erred by ordering the Prosecution to produce five original videos that it did not have in its possession. The order created an unreasonable burden for the Prosecution based on the fact that the originals were lost, destroyed, or unobtainable. The Prosecution acted in good faith and produced all the evidence it possessed or intended to use at trial. Further, both parties possessed duplicates of the recordings and there was no exculpatory evidence contained therein. Asiata was not prejudiced by not having the originals and could have conducted his own investigation and obtained evidence through his own reasonable efforts.

The trial court erred in dismissing the case against Asiata based on the Prosecution's inability to produce the five originals. Rule 25(a) of the Utah Rules of Criminal Procedure allows a judge, in his discretion, to dismiss a criminal case "for substantial cause and in furtherance of justice." However, the Utah Court of the Appeals has stated, "Dismissal of a criminal information as a sanction against the prosecutor is rarely appropriate, even if the prosecutor is in contempt of court." *Salt Lake City v. Dorman-Ligh*, 912 P.2d 452, 456 (Utah Ct. App. 1996). The court's dismissal was unreasonable based on the fact that the Prosecution had provided legitimate reasons to the court as to why it was unable to secure the originals requested by the defense.

## ARGUMENT

### I. THE TRIAL COURT ERRED BY ORDERING PROSECUTION TO PRODUCE THE ORIGINALS OF VIDEO FOOTAGE THAT HAD ALREADY BEEN PRODUCED TO DEFENDANT ON DVD, WHEN PROSECUTION DID NOT POSSESS THE ORIGINALS, AND WHEN THE ORIGINALS DID NOT CONTAIN ANY EXCULPATORY EVIDENCE, OR ANY EVIDENCE THAT OTHERWISE WOULD BE HELPFUL TO DEFENDANT'S CASE.

The trial court erred by ordering American Fork City ("Prosecution") to produce the originals of video footage that had already been produced to Defendant ("Asiata") on DVD, when Prosecution did not possess the originals, and when the originals did not contain any exculpatory evidence, or any evidence that otherwise would be helpful to Asiata's case. Rule 16(a) of the Utah Rules of Criminal Procedure requires that the prosecutor provide to the defense the following material and information:

> (1) relevant written or recorded statements of the defendant or codefendants;
>
> (2) the criminal record of the defendant;
>
> (3) physical evidence seized from the defendant or codefendant;
>
> (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and
>
> (5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

Here, the Prosecution produced copies of the six videos that had been brought to the police by concerned citizens. (R. 0128, ¶ 7; R. 0038-0037). Asiata viewed the videos and subsequently moved the trial court to suppress the evidence because the DVDs were

duplicates, not originals. (R. 0059-0057; R. 0134, p. 11). However, by that time, the police had already returned the originals back to the owners, except for the Bangerter video. (R. 0134, p. 10, lines 16-19). The trial court erred in ordering Prosecution to retrieve and produce the other five originals, when such recordings were (1) not in possession of the Prosecution, and (2) when the originals, as evidenced by the duplicated copies, did not contain any exculpatory evidence, or (3) any evidence that Defendant could not have obtained through his own efforts, or (4) any evidence that was helpful to Defendant's case.

### A. The Trial Court Erred in Ordering the Prosecution to Produce Evidence it did not Have in its Possession.

The trial court erred in ordering Prosecution to produce evidence it did not have in its possession. Generally, duplicates of documents, recordings, or photographs are admissible, "unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Rule 1003, Utah Rules of Evidence. There are several important exceptions to the "best evidence rule." The Utah Supreme Court stated, "The rules of evidence provide for exceptions in cases where the originals are lost or destroyed, the original is not obtainable, the original is in the possession of the opponent, or the writing concerns a collateral matter." *Gorostieta v. Parkinson*, 2000 UT 99, ¶ 38, 17 P.3d 1110 (Utah 2000) (emphasis added); *see also* Rule 1004 of the Utah Rules of Evidence.

In this case, the originals were returned to the owners after duplicates were made by police. (R. 0094; R. 0134, p. 4, lines 1-3). Unfortunately, the names and addresses of

owners were not recorded, although it appears that some of the footage was subsequently erased or recorded over by the owners. (R. 0134, p. 4:1-3; R. 0093). Therefore, the originals were (1) not obtainable, (2) destroyed, or (3) lost. Rule 1004 of the Utah Rules of Evidence speaks to each case:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
>
> (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> (2) Original not obtainable. No original can be obtained by any available judicial process or procedure

While Asiata raised a question as to the authenticity of one of the recordings (not the Bangerter video), Asiata never alleged any bad faith on the part of Prosecutor. (R. 0134, p. 8, lines 17-22). Asiata's attorney said, "I don't think [the Prosecutor] is involved in any monkey business here." (R. 0134, p. 9, lines 4-5). The Prosecution was simply unable to locate and retrieve the originals. Based on the fact that there was no bad faith, the provisions of Rule 1004 clearly state that duplicates are admissible when the originals are lost, destroyed or unobtainable.

Asiata argues that because the Prosecution or police had the originals in its possession at one time, then it had a duty to provide them to defendant. That, however, is not the law. In *State v. Knill*, the Utah Supreme Court held that just because law enforcement had a potentially evidentiary item in its possession at one time did not mean the City had to produce the item to the defense. *See State v. Knill*, 656 P.2d 1026 (Utah 1982). In *Knill*, the defendant was charged with auto theft. Some time after the theft

occurred, police officers recovered the stolen car and returned it to its out-of-state owner. Defendant unsuccessfully moved the court for an order requiring the State to produce the automobile for inspection. The Utah Supreme Court stated that the lower court did not abuse its discretion in denying the defendant's motion "when [the automobile] was no longer in the possession of the State and when there was no showing of its evidentiary significance to the defense." *Id.* at 1027-28 (emphasis added). Thus, the Prosecution does not have to provide an item to the defense simply because law enforcement had such an item in its possession at one time.

The trial judge abused his discretion by requiring the prosecution to do what was impossible—that is, to produce evidence that was unobtainable. The trial judge had the discretion to suppress the duplicate DVDs, but it went beyond its discretion when it dismissed the case. Therefore, the trial judge erred in ordering the Prosecution to secure the originals that were not obtainable through the exercise of reasonable diligence.

### B. The Prosecution Did Not Have a Duty to Produce the Originals Because Such Recordings Do Not Contain Exculpatory Evidence and Requiring So Would Constitute an "Unbearable Burden."

The Prosecution did not have a duty to provide the original video recordings because such recordings did not contain exculpatory evidence. Both parties viewed the duplicates and were fully apprised of the contents of the recordings. By definition, a duplicate is an exact copy of the original. Therefore, if the originals contained any exculpatory evidence, it would also be contained in the duplicates. Having viewed the recordings, Asiata was unable to find any exculpatory evidence therein.

The Utah Supreme Court held that a prosecutor does not have a duty to disclose all information in its possession, only that evidence that is clearly exculpatory. In *State v. Jarrell*, the Court stated that "a prosecutor has a constitutional duty to volunteer obviously exculpatory evidence and evidence that is 'so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce.'" *State v. Jarrell*, 608 P.2d 218, 224 (Utah 1980), citing *U.S. v. Agurs*, 427 U.S. 97, 107. On the other hand, the Court reasoned that if a prosecutor were required to disclose all the evidence it had, it would create "unbearable burdens":

> [W]e do not think it reasonable, given the adversary nature of the criminal process, to require a prosecutor to disclose all evidence which might possibly be useful to the defense but which is not likely to have a foreseeable effect upon the verdict. Such a requirement would create unbearable burdens and also uncertainties with respect to the finality of judgments." *Jarrell*, 608 P.2d at 225.

A similar ruling was reached in *State v. Bisner*, where the Court held that "the prosecutor is not required to deliver his entire file to defense counsel, but only evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *State v. Bisner*, 2001 UT 99, ¶ 33, 37 P.3d 1073 (Utah 2001). Asiata failed to show how he would be prejudiced at trial by not having the originals, when he possessed all of the duplicates. Other than a vague innuendo regarding the phasing in and out of the camera in one video, Asiata has failed to show any specific reason as to question the authenticity of the videos. (R. 0134, p. 7, lines 17-24). Instead, Asiata has embarked on a fishing expedition, arguing that exculpatory evidence "is in existence out there somewhere." (R. 0135, pp. 8:25-9:1).

Since the law does not require a prosecutor to disclose everything in his possession unless the evidence is exculpatory or otherwise required by law, how could a prosecutor be required to disclose evidence that is not exculpatory and not in his possession? Here, the Prosecution disclosed everything it had to Asiata, which included 6 recordings and one original. Asiata therefore possessed the same evidence as the Prosecution. The trial judge, by ordering the Prosecution to track down and retrieve the originals, placed an "unbearable burden" on the Prosecution, since the originals were lost, destroyed, or unobtainable.

### C. The Prosecution Did Not Have a Duty to Provide the Originals Because Asiata had Knowledge of the Video Recordings and Could Have Obtained Them Through His Own Efforts.

The Prosecution did not have a duty to provide the originals to Asiata because he had knowledge of the video recordings and could have obtained them through his own reasonable efforts. In discussing a *Brady* violation, the Utah Supreme Court explained that the state wrongfully suppresses information when that information "remains unknown to the defense both before and throughout the trial." *State v. Bisner*, 2001 UT 99, ¶ 33, 37 P.3d 1073 (Utah 2001). The Court concluded that when "a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government." *Id.* at ¶ 40, quoting *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991).

Furthermore, when a defendant knows of the relevant undisclosed information, the defendant has an independent duty to obtain such information. The Utah Court of

Appeals held that "when a prosecutor fails to provide evidence to the defense, regardless of the [evidence's] exculpatory or inculpatory nature, it [is] not improperly withheld by the prosecution [when the defendant] and/or his attorney knew or should have known of it." *State v. Borgogno*, 1998 Utah App. LEXIS 140 (Utah Ct. App. Oct. 1, 1998) (internal citations omitted). It is well settled that "defense counsel also has an affirmative duty to make a reasonable investigation." *State v. Kallin*, 877 P.2d 138, 143 (Utah 1994). It is clear that a prosecutor is not required to do the defense attorney's job. If a defendant knows of information that he believes will help his case, then he is responsible to make reasonable efforts to obtain the information he seeks and should not shift the burden to the prosecution.

### D. There is Not Good Cause for Requiring the Prosecution to Provide the Originals to Defendant When the Prosecution Intended to Only Use the Video for Which it Had the Original, and When the Recordings Would Not Be Helpful to Asiata's Case.

There is not good cause for requiring the Prosecution to provide the originals to Asiata when the Prosecution intended to only use the video for which it had the original, and when the recordings would not be helpful to Asiata's case. In order to resolve any evidentiary issues that Asiata might raise regarding the recordings, the Prosecution chose to use only the Bangerter recording for which it had the original. Asiata's attorney had the opportunity to view the original Bangerter recording and the City subpoenaed G. Paulo Bangerter to lay the proper foundation. Asiata failed to show how not having the other 5 originals would have prejudiced him at trial, when those recording were not going

to be used by the Prosecution. Further, the absence of exculpatory evidence in the recordings rendered them unhelpful to defense's case.

In summary, the trial court erred by ordering the Prosecution to produce evidence it did not have in its possession, which created an unbearable burden and impossible task for the Prosecution since the 5 originals were lost, destroyed, or unobtainable. The Prosecution acted in good faith. Both parties had possession of all of the recordings, and there was no exculpatory evidence therein. Asiata was not prejudiced by not having all of the originals because the Prosecution only intended to use the Bangerter video for which it had the original. Therefore, the trial court abused its discretion when it ordered the Prosecution to retrieve the other 5 originals.

## II. THE TRIAL COURT ERRED IN DISMISSING THE CASE WHEN THE PROSECUTION DID NOT MEET A DEADLINE TO PRODUCE THE ORIGINAL VIDEOS THAT IT DID NOT HAVE IN ITS POSSESSION.

The trial court erred in dismissing the case when the Prosecution did not meet a deadline to produce the original videos that it did not have in its possession. The grounds for the dismissal was that the prosecutor "did not provide defense counsel with the original 6 video recordings, or the names and addresses of those who provided them to Plaintiff, within 30 days of May 27, 2008.... No valid reason was provided by the prosecution for its failure to comply with this Court's order on May 27, 2008." (R. 0125, ¶ 21). In reality, the Prosecution had clearly explained to the trial court the reasons it could not provide the 5 originals. (R. 0134, 4:1-3; R. 0135, 8:18-22; R. 0123-0120).

Based on the Prosecution's inability to summon back the originals which had been lost or destroyed, the trial court dismissed the case entirely. "Although trial courts possess discretion in imposing appropriate penalties for violation of discovery orders, that discretion is not without limits." *Morton v. Continental Baking Co.*, 938 P.2d 271, 279 (Utah 1997) (internal citations omitted). Here, the trial court exceeded that limit. In a case where the trial court had dismissed the action based on the Prosecution's failure to respond to discovery requests and failure to prosecute, the Utah Supreme Court stated:

> It is not to be doubted that . . . the trial court should have a reasonable latitude of discretion in dismissing for failure to prosecute if a party fails to move forward according to the rules and the directions of the court, without justifiable excuse. But that prerogative falls short of unreasonable and arbitrary action which will result in injustice. *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876, 878-879 (Utah 1975).

In this case, the dismissal was unreasonable because the Prosecution had provided the court with legitimate reasons for its inability to produce the originals.

Rule 25(a) of the Utah Rules of Criminal Procedure provides for dismissal of a criminal charge, in the trial court's discretion, "for substantial cause and in furtherance of justice." Utah R. Crim. P. 25(a). However, the Court of the Appeals cautioned, "Dismissal of a criminal information as a sanction against the prosecutor is rarely appropriate, even if the prosecutor is in contempt of court." *Salt Lake City v. Dorman-Ligh*, 912 P.2d 452, 456 (Utah Ct. App. 1996) (emphasis added). It is clear that the case against Asiata was dismissed as a direct result of the Prosecution's inability to produce the 5 originals. (R. 0125, ¶ 21). The Prosecution's fault, if any, did not rise to "substantial cause," nor did the dismissal further justice. Rule 25(a), Utah R. Crim. Pro.

If the trial court deemed any sanction was called for, it could have suppressed the recordings for which there were no originals instead of dismissing the case outright.

## CONCLUSION

Based on the authority cited above, the Prosecution requests that the trial court's dismissal of the action against Asiata be reversed and that this case be remanded for further proceedings.

DATED this 22nd day of December, 2008.

HANSEN WRIGHT EDDY & HAWS

Kasey L. Wright

KASEY L. WRIGHT
Attorney for American Fork City/Appellant

## CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing **APPELLANT BRIEF**, postage prepaid by first class mail, on this 23rd day of December, 2008, to the following:

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**IN THE UTAH COURT OF APPEALS**

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| **AMERICAN FORK CITY,**<br>Plaintiff / Appellant,<br>vs.<br>**WILLIAM SHAWN ASIATA,**<br>Defendant / Appellee. | **STATEMENT REGARDING NO ADDENDUM NECESSARY**<br>Case No. 20080651-CA |

Plaintiff, by and through its counsel, HANSEN WRIGHT EDDY & HAWS, hereby states that it believes no addendum is necessary in this matter because the pertinent portions of the record, and relevant authority, are adequately contained in the body of Appellant's Brief.

DATED this 29th day of December, 2008.

HANSEN WRIGHT EDDY & HAWS

Kasey L. Wright
KASEY L. WRIGHT
Attorney for Plaintiff